Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

ABN AMRO Mortgage Group, Inc.,
a Delaware corporation,

Petitioner,

v.

GREGORY AND MARAGART WEIZEORICK,
Individually, and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK A. RABINOWITZ
Counsel of Record

JENNY S. KIM
NEAL, GERBER & EISENBERG LLP
TWO NORTH LASALLE STREET
SUITE 2300
CHICAGO, IL 60602
(312) 269-8000

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

48 00

QUESTION PRESENTED FOR REVIEW

This proceeding involves a question of exceptional importance, namely whether an anti-kickback statute, Section 8(b) of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) ("RESPA") can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee. In *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit held that RESPA requires allegations that the defendant actually "***shared*** an unearned fee with a third party." 256 F.3d at 627 (emphasis added). In *Echevarria*, the Seventh Circuit held that mere retention of a portion of the total sum paid ***does not*** constitute a fee split for purposes of RESPA. *Id.* at 626-27.

However, in the present case, the Court of Appeals, in conflict with its prior decision in *Echevarria* and the plain language of Section 8(b) of RESPA, held that RESPA does not "require that the plaintiff allege that all of the parties involved in [an alleged] fee splitting ***have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement.***" (emphasis added). By extending the reach of RESPA to parties who have no knowledge that their fees are duplicative of separate fees charged by others, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere innocent fee collection oversights. The effect of the Court of Appeals' holding is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. Thus, because the Court of Appeals' decision significantly departs from the common understanding that RESPA is fundamentally an anti-kickback statute and radically expands the scope of RESPA's

reach to punish inadvertent conduct, petitioner respectfully requests that *certiorari* be granted on the following question:

May a lender that charges a fee for a service that it intends to perform, but ultimately does not perform, be held liable for sharing an unearned fee with a third party in violation of Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b), when an independent settlement agent who controls the settlement receives a separate fee for the same service and performs that service ***without the knowledge of the lender***?

PARITIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner ABN AMRO Mortgage Group, Inc. ("AAMG") is a Delaware Corporation. AAMG's parent corporations are: (1) Standard Federal Bank, NA; (2) LaSalle Bank Corp.; and (3) ABN AMRO Bank NV. No publicly held company owns 10 percent or more of AAMG's stock.

The respondents are Gregory and Margaret Weizeorick. The Weizeoricks were plaintiffs-appellants in the underlying proceeding. The Weizeoricks are citizens of the State of Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, ABN AMRO Mortgage Group, Inc. ("AAMG"), respectfully petitions for a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 24, 2003.

OPINIONS BELOW

The Opinion of the Court of Appeals is reproduced in Appendix B. The prior Opinion of the United States District Court for the Northern District of Illinois is reproduced in Appendix C.

JURISDICTION

The Court of Appeals' decision was entered on July 24, 2003. ABN AMRO Mortgage Group, Inc. filed a timely petition for rehearing on August 5, 2003. The Court of Appeals denied ABN AMRO Mortgage Group, Inc.'s petition on September 17, 2003. App. A, infra, pp. 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b), provides:

> **Splitting charges.** No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

STATEMENT OF THE CASE

A. Factual Background

This action arises out of the Weizeoricks' repayment of their prior mortgage loan to ABN AMRO Mortgage Group, Inc. ("AAMG"), the holder of the mortgage. At the request of the Weizeoricks or their agent, AAMG provided the Weizeoricks with a Payoff Statement on or about July 18, 2000. Among the charges listed on the Payoff Statement was a "Recording Discharge/Release of Lien Fee" in the amount of $10. At the time AAMG issued this Payoff Statement, it had no knowledge that the Weizeoricks intended to pay off the loan through a sale of the real estate securing the loan or that the Weizeoricks' purchasers intended to finance their purchase of that real estate through the closing of a federally related mortgage transaction.

Two weeks later, on July 24, 2000, without any notice to or knowledge by AAMG, the Weizeoricks closed the federally related mortgage transaction in connection with the sale of the real estate which secured AAMG's prior mortgage. Since AAMG was not a party to that transaction, AAMG had no way of knowing that a fee for recording the discharge/release of mortgage was made by the Weizeoricks' closing agent in the amount of $25.60 ***in addition to the $10.00 fee for the same service that was included in the Payoff Statement issued by AAMG two weeks earlier***. At this point, AAMG did not even know that its loan would be paid off through the proceeds of a federally related mortgage transaction. On the other hand, the Weizeoricks and their closing agent had full opportunity to review the Payoff Statement and the closing figures for that transaction and to know that a duplicate fee was being charged. Despite what the Weizeoricks and their closing agent knew or should have

known, the Weizeoricks directed the closing agent to send AAMG the full amount stated in its Payoff Statement (including the recording fee) and directed that the closing agent be paid a separate recording fee as indicated in the agent's closing statement. Ultimately, the closing agent, not AAMG, recorded the discharge/release of mortgage. At no time prior to filing suit did the Weizeoricks ever notify AAMG that the title company had collected a separate fee or request AAMG to refund the disputed $10.00 fee.

B. The District Court Proceedings

On February 1, 2001, the Weizeoricks filed a Class Action Complaint against AAMG, purporting to state a claim for violation of Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq*. The Weizeoricks also asserted claims for breach of contract, restitution, and violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq*. The Weizeoricks invoked the jurisdiction of the District Court pursuant to Section 16 of RESPA (12 U.S.C. § 2614) and 28 U.S.C. § 1331 and, as to their state law claims, supplemental jurisdiction under 28 U.S.C. § 1367.

The Weizeoricks alleged that, because (1) they paid separate fees for the recording of the discharge/release of their mortgage to AAMG and the title company, serving as the Weizeoricks' closing agent, and (2) the title company, not AAMG, recorded the discharge/release of their mortgage, AAMG violated Section 8(b) of RESPA (12 U.S.C. § 2607(b)). That section provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement

service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

By Order dated November 16, 2001, the United States District Court for the Northern District of Illinois dismissed the Weizeoricks' Complaint on the grounds that they had "failed to plead facts showing that Defendant illegally shared fees with the third party title company" because, since "the title company had no involvement in the unearned $10 fee accepted by [AAMG], it is not considered as a third party for purposes of RESPA § 8(b)." App. C, infra, p. 21a. Relying on *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), the District Court found that "unearned fees are not actionable under RESPA unless they are shared by at least two parties." App. C, infra, p. 21a. Because the Weizeoricks accused AAMG of nothing more than having charged and collected an unearned $10 fee, and the title company had no involvement in the unearned $10 fee accepted by AAMG, the District Court held that the Weizeoricks had "failed to plead fact showing that Defendant illegally shared fees with the third party title company." App. C, infra, p. 21a.

Following the District Court's dismissal of the Weizeoricks' RESPA claim, AAMG moved for dismissal of the remaining state law claims, pursuant to 28 U.S.C. § 1367(c). In response, the Weizeoricks moved for reconsideration of the dismissal of their RESPA claim. On June 25, 2002, the District Court denied the Weizeoricks' request for reconsideration, and granted AAMG's motion for dismissal of the state-law claims pursuant to 28 U.S.C. § 1367(c).

C. The Court Appeals' Decision

The Weizeoricks appealed from the District Court's decisions. On July 24, 2003, the United States Court of Appeals for the Seventh Circuit reversed the District Court's dismissal of the Weizeoricks' RESPA claim and remanded the case for further proceedings. The Court of Appeals found that the Weizeoricks' Complaint stated a cause of action for violation of Section 8(b) of RESPA, despite the fact that the Weizeoricks had not alleged that AAMG had known of the alleged fee splitting. The Court of Appeals acknowledged that subjecting an existing lender to RESPA liability for mere wrongful collection of fees "would radically, and wrongly, expand the class of cases to which RESPA applies." App. B, infra, p. 9a. Nevertheless, relying on *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), the Court of Appeals found that RESPA does not "require that the plaintiff allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." App. B, infra, p. 13a.

The Court of Appeals' decision misapprehends the meaning and scope of Section 8(b) of RESPA by rendering a lender that charges a settlement service fee liable under RESPA whenever a title company that controls the settlement receives a separate fee for the same service without the lender's knowledge. By extending the reach of RESPA to parties that have no knowledge that their fees are duplicative of fees charged by others, the Court of Appeals effectively transformed RESPA from an anti-kickback statute into a statute that punishes mere innocent fee collection oversights. This result would make RESPA violations out of untold thousands of ordinary inadvertent errors caused by entities that are not parties to a federally related mortgage transaction and do not even know that the proceeds they receive are

derived from a federally related mortgage transaction – a result that has no basis in the language of the statute.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision erroneously and radically expands the scope of Section 8 of RESPA (12 U.S.C. § 2607(b)) to punish innocent unknowing conduct where a closing agent accepts a fee for a settlement service and the existing lender charges a separate fee for a similar service ***without the existing lender's knowledge*** of the duplicate fee and without the existing lender knowing that the service involved is a settlement service under RESPA. The Court of Appeals' decision misapprehends the meaning and scope of that anti-kickback statute and conflicts with prior decisions of that Court, as well as those of other jurisdictions.

A. The Court of Appeals' Decision Radically and Erroneously Applies RESPA to Innocent and Unknowing Conduct

The Court of Appeals' decision significantly misapprehends the meaning and scope of Section 8(b) of RESPA. The decision holds that that anti-kickback statute can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform. The decision erroneously renders such a lender liable for violating RESPA whenever a title company that controls the settlement receives a ***separate fee*** for the same service ***without the knowledge of the lender*** and performs that service.

Previous decisions of the Court of Appeals for the Seventh Circuit (and the courts of other jurisdictions) have consistently held that RESPA is fundamentally an anti-kickback statute.

By extending the reach of RESPA to parties who have no knowledge that their fees are duplicative of fees charged by others, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere fee collection oversights. This result would make RESPA violations out of untold thousands of ordinary inadvertent errors caused by entities that are not even parties to the transaction – a result that has no basis in the language of the statute.

It is well settled that RESPA is fundamentally "an anti-kickback statute." *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985). Its protections extend only to federally related mortgage transactions "where the defendant gave or received 'any portion, split, or percentage of any charge' to a third party." *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1187 (7th Cir.), cert. denied, 513 U.S. 811 (1994) (citing *Mercado*, 763 F.2d at 270-71). *See also Echevarria*, 256 F.3d at 627; *Christakos*, 196 F.R.D. at 503; *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306, 1308-09 (M.D. Ala. 1998); *Barbosa v. Target Mortgage Corp.*, 968 F. Supp. 1548, 1558 (S.D. Fla. 1997); *Campbell v. Machias Sav. Bank,* 865 F. Supp. 26, 31 n.5 (D. Me. 1994); *Duggan v. Independent Mortgage Corp.*, 670 F. Supp. 652, 653-54 (E.D. Va. 1987). RESPA "requires at least two parties to share fees." *Durr*, 14 F.3d at 1187. Where the plaintiff's complaint does not allege any kickback to a third party, the plaintiff fails to state a claim under RESPA. *Id.*

Despite the well settled case-law holding that RESPA is an anti-kickback statute, requiring that at least two parties ***share*** a ***single fee***, the Court of Appeals held that Section 8(b) of RESPA can be used to punish an existing lender whenever a title company, who controls the settlement proceeds, receives

a ***separate fee*** for the same service ***without the knowledge of the lender***. Although the Court of Appeals acknowledges that subjecting an existing lender to RESPA liability for mere wrongful collection of fees "would radically, and wrongly, expand the class of cases to which RESPA applies," the Court of Appeals did just that by extending the reach of RESPA to punish parties who have no knowledge that their fees are duplicative of fees charged by others. App. B, infra, p. 9a.

There is no support for the Court of Appeals' radical extension of the scope of Section 8(b) of RESPA. While the Court of Appeals cited *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), in support of its novel holding, the *Christakos* case in no way stands for the proposition that a lender may be punished for merely charging a duplicative, unearned fee.

In the *Christakos* case, Ms. Christakos refinanced her home and closed the transaction, with the title company acting as settlement agent at the closing. As in our case, the prior mortgagee issued a payoff letter which included a charge for recording the release of the existing mortgage. Then, at closing, the title company charged an additional fee for the same service. Then, in a situation totally ***opposite*** from that found in our case, ***the existing lender***, not the title company, recorded the release of Ms. Christakos' mortgage. The court held that Ms. Christakos' complaint stated a viable RESPA claim ***against the title company that had control over the closing*** and knowledge of all fees being charged.

Significantly, the *Christakos* holding was based upon allegations that the two recordation fee payments "were made from the same pool of funds from the loan proceeds over which [***the title company***], ***as settlement agent, had control and directed payments made from.***" 196 F.R.D. at 503

(emphasis added). In other words, in *Christakos*, the title company charged a fee to record the release of the existing mortgage even though it ***simultaneously*** was collecting a fee for the prior mortgagee to record the same release. Thus, the title company knowingly charged the owner two fees for the identical service that could only be performed once.[1]

In contrast, the Weizeoricks' Complaint in the instant case makes no allegation that the moneys paid to AAMG and to the title company were ever "pooled" by AAMG in any way, that the money paid to the title company was ever in AAMG's control, or that AAMG ***knew*** that the title company even received a recording fee. Accordingly, the fee-split required to invoke RESPA is plainly lacking here. Unlike the title company in *Christakos*, AAMG did not have control over the settlement of the sale, was not even a party to that settlement and had no knowledge of any terms of the settlement, including the fact that the title company was going to charge a fee already included in AAMG's Payoff Statement, as AAMG issued its Payoff Statement on July 18, 2000, six days prior to the July 24, 2000 closing.

AAMG did no more than charge and collect a $10 fee, which the Weizeoricks allege was unearned. This is simply not actionable under RESPA. The fact that the Weizeoricks' closing agent collected that $10 fee charged by AAMG and handed that fee over to AAMG does not transform this case

[1] Indeed, even the knowing conduct of a title company, such as that which took place in *Christakos*, has not been uniformly deemed a RESPA violation. In *Monroe v. Citywide Title Corp.*, No. 02 C 2101, 2003 U.S. Dist. LEXIS 4146 (N.D. Ill. March 12, 2003), a case which was decided three years ***after*** *Christakos*, the Court ruled that the ***exact same conduct*** alleged in *Christakos* could not be turned into a RESPA Section 8(b) claim. *Monroe*, 2003 U.S. Dist. LEXIS 4146, at *6.

into *Christakos*. Control over the closing and knowledge of duplicative fee collection, while not separate elements of a RESPA claim, are indicia of whether the accused party was engaged in the type of improper kick-back or fee-split prohibited by RESPA. A party who did nothing more than charge and collect a fee without knowledge that a third party received a separate fee has not shared an unearned fee or engaged in any kick-back scheme.

The Court of Appeals' decision radically expands the class of cases to which RESPA applies, and significantly extends the intended scope of RESPA's reach to punish mere fee collection oversights. Because the Court of Appeals' decision departs significantly from the well-settled understanding that RESPA is fundamentally an anti-kickback statute, this Court should exercise its supervisory powers to clarify the intended meaning and scope of the statute.

B. The Court of Appeals' Decision Conflicts With Its Prior Decisions that Section 8(b) of RESPA is Not Violated Unless the Defendant Knowingly Splits a Fee With a Third Party

Previous decisions of the Court of Appeals (as well as the courts of other jurisdictions) have suggested that RESPA is fundamentally an anti-kickback statute, which is violated only if a defendant ***knowingly*** splits a fee with a third party for a service which the defendant does not actually perform. *See Echevarria*, 256 F.3d at 627; *Durr*, 14 F.3d at 1187; *Christakos*, 196 F.R.D. at 503; *Willis*, 5 F. Supp. 2d at 1308-09; *Barbosa*, 968 F. Supp. at 1558; *Campbell,* 865 F. Supp. at 31 n.5; *Duggan*, 670 F. Supp. at 653-54. Indeed, in *Echevarria*, the Seventh Circuit recently reaffirmed that, absent allegations of an ***actual*** kickback or fee-split with a third party, there can be no RESPA claim. 256 F.3d at 626.

Specifically, the court in *Echevarria* held that a plaintiff who "fail[s] to accuse a third party of accepting unearned fees" cannot proceed under RESPA. *Id.* at 627 (emphasis added).

In *Echevarria*, as in our case, the plaintiffs misguidedly argued that a fee-split need not be literal for purposes of RESPA, but that, rather, fees are split whenever two entities receive fees for a service and the sum total of those fees is more than the service actually cost. *Id.* at 626. Specifically, the plaintiffs in *Echevarria* argued that a $45 fee that they paid to their title company "was illegally split when [the title company] paid a third party, the County Recorder, a portion of the fees . . . and retained the overcharges . . . for itself." *Id.* According to the plaintiffs, a "focus on the whole $45.00" revealed a fee split because $45 was the total amount plaintiffs paid for recordation of the release of their mortgage, and the defendant, in the end, retained a portion of that sum. *Id.* However, the Seventh Circuit rejected the plaintiffs' argument, explaining that RESPA requires allegations that the defendant actually "***shared*** an unearned fee with a third party." *Id.* at 627 (emphasis added). According to the court, mere retention of a portion of the total sum paid ***does not*** constitute a fee-split for purposes of RESPA. *Echevarria*, 256 F.3d at 626-27.

The Weizeoricks have failed to allege any fee-split, fee-sharing, or kickback of any kind. Indeed, their claim is even less akin to the type of fee-splitting RESPA addresses than was the claim rejected by the court in *Echevarria*. In the Weizeoricks' case, there are no allegations that any funds were shared between AAMG and a third party or transmitted in any way by AAMG to a third party. The Weizeoricks have merely alleged that AAMG collected an unearned fee. Nevertheless, the Court of Appeals held that the Weizeoricks'

Complaint stated a cause of action under Section 8(b) of RESPA.

In conflict with both its prior decisions, and the plain language of the statute, the Court of Appeals found that RESPA does not "require that the plaintiff allege that all of the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." App. B, infra, p. 13a. In so holding, the Court of Appeals impermissibly extended the reach of RESPA to parties who have no knowledge that their fees are duplicative of fees charged by others. In effect, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere inadvertent conduct. Because the Court of Appeals decision radically, and wrongfully, expands the class of cases to which RESPA applies, it is necessary and important for this Court to exercise its supervisory powers to review, and correct, the Court of Appeals' erroneous holding.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

MARK A. RABINOWITZ
Counsel of Record
JENNY S. KIM
NEAL, GERBER & EISENBERG LLP
Attorneys for Petitioner
Two North LaSalle Street
Suite 2300
Chicago, Illinois 60602
(312) 269-8000

APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 02-2801

[Filed September 17, 2003]

Gregory & Margaret Weizeorick, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,	)
v.	)
ABN AMRO Mortgage Group, Inc., a Delaware corporation, Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 0713
Honorable William J. Hibbler

Before MANION, KANNE, and DIANE P. WOOD,
Circuit Judges

ORDER

On consideration of the petition for rehearing en banc filed by defendant-appellee, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

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[1] Judge Flaum did not participate in the consideration of this petition.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

No. 02-2801

[Filed July 24, 2003]

Gregory & Margaret Weizeorick, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,	)
v.	)
ABN AMRO Mortgage Group, Incorporated, a Delaware Corporation, Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 0713
Honorable William J. Hibbler

Before MANION, KANNE, and DIANE P. WOOD,
Circuit Judges

OPINION

MANION, Circuit Judge.

I.

On February 1, 2001, Gregory and Margaret Weizeorick filed suit alleging that ABN AMRO Mortgage Group Inc. violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, and state law provisions, by illegally splitting a fee with the closing agency without performing any services. The district court determined that no fee split had occurred as a matter of law and dismissed their federal allegations for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Weizeoricks appeal, and because they successfully pleaded a claim for relief, we reverse.

II.

On July 24, 2000, Gregory and Margaret Weizeorick closed on the sale of their home in Chicago, Illinois. In connection with the closing and the repayment of their mortgage, ABN AMRO Mortgage Group ("AAMG"), as holder of the mortgage, provided the Weizeoricks and the closing company with a "Payoff Statement" on July 18, 2000. The Payoff Statement included a charge of $10.00 for a "Recording Discharge/Release of Lien Fee." The Weizeoricks paid this fee at the closing of the sale of their home as part of the payoff of their mortgage loan. Also at closing, the Weizeoricks were charged a "Release Fee" of $25.60 by the closing company, Attorneys' Title Guaranty

Fund, Inc, as part of the "settlement charges" owed as the seller of the home. The Weizeoricks paid that fee as well.

On February 1, 2001, the Weizeoricks filed a class action lawsuit alleging that AAMG's practice of collecting $10.00 for "recording" services from borrowers at the closing on the sale of their homes violates the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, as well as state law. Specifically the Weizeoricks invoked Section 8(b) of RESPA, or 12 U.S.C. § 2607(b), which prohibits the receipt of a portion of a fee paid for real estate services without actually performing the service. *Id.* The Weizeoricks alleged that AAMG violated RESPA and Illinois state law by receiving $10.00 of the $35.60 fee for recording the discharge of their lien, even though AAMG did not record the release of the mortgage. According to the Weizeoricks' allegations, the title company, not AAMG, recorded the discharge/release of their mortgage.

AAMG subsequently moved to dismiss the Weizeoricks' entire complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The Weizeoricks withdrew their motion for class certification, likely because of the unique and somewhat complex series of transactions that occurred between the closing company and the title company. They instead proceeded as individual plaintiffs. On November 16, 2001, the district court, relying on *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), dismissed the Weizeoricks' RESPA claim with prejudice, finding that the Weizeoricks had failed to allege that AAMG had illegally split fees with the closing agent. The district court determined that because the title company and AAMG had each independently charged the Weizeoricks a standard fee for the recording

service, there was no split of an unearned fee to a third party, as required by the statute. The Weizeoricks then moved to reconsider the dismissal of the RESPA claim and AAMG contemporaneously moved under 28 U.S.C. § 1367(c)(3) to dismiss the Weizeoricks' state law claims. The district court denied the Weizeoricks' motion, granted AAMG's motion, and dismissed the Weizeoricks' case in its entirety.

III.

On appeal, the Weizeoricks contend that the district court erred in dismissing their claim against AAMG because their allegations were sufficient to state a claim under § 2607(b) of RESPA.[1] They contend that the district court impermissibly interpreted § 2607(b) by requiring a plaintiff to allege that the defendant arranged for a third party to receive unearned fees in order to show a violation of the statute. The district court erred in this conclusion, they argue, because § 2607(b) of RESPA only prohibits a person from accepting an unearned portion of a charge for settlement services and does not require an allegation of whether or not the defendant had control of the settlement fee overcharge.

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[1] The Weizeoricks only appeal that part of the district court's November 16, 2001 order and opinion granting AAMG's Fed. R. Civ. P. 12(b)(6) motion to dismiss the Weizeoricks' federal law claim, which arose under RESPA, and that part of the district court' s June 25, 2002 order denying the Weizeoricks' motion to reconsider the dismissal of the RESPA claim. The June 25, 2002 order also granted, pursuant to 28 U.S.C. § 1367(c)(3), AAMG's motion to dismiss the remainder of the Weizeoricks' claims, all of which arose under state law. The Weizeoricks have not appealed the dismissal of their state law claims.

This court reviews *de novo* the district court's grant of AAMG's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See International Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 729 (7th Cir.1999). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73, (1984).

To determine if dismissal was appropriate in this case we turn to the statutory basis for the Weizeoricks' suit. Section 8(b) of the RESPA provides:

> 1 .No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).

The initial question then is whether Section 8(b) prohibits a party to a real estate transaction from simply accepting an unearned fee, or does it require that the unearned amount be part of a split or percentage of a charge. This court has explained that Section 8(b), entitled "Prohibition against kickbacks and unearned fees," is an anti-kickback measure that prohibits real estate settlement overcharges when a "portion" or "percentage" of the charge is kicked back to or "split" with a third party who performs no service.

> The statutory language describes a situation in which A charges B (the borrower) a fee of some sort, collects it, and then either splits it with C or gives C a portion or percentage (other than 50 percent--the situation that the statutory term "split" most naturally describes) of it. A might be a lawyer, and C a closing agent ..., and A might charge a legal fee to B and kick back a share of it to C for recommending to the borrower that he use A's services. That would be a form of commercial bribery and is the target of section 8(b).
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> —

Kzralic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002). Our case law has consistently held that Section 8(b) is not violated unless the defendant splits a fee with a third party. *Kzralic*, 314 F.3d at 881; *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 627 (7th Cir. 2001); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985). We have stressed that "under RESPA's express terms," the broad protection of the statute "extends only over transactions where the defendant gave or received any portion, split, or percentage of any charge to a third party." *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1187 (7th Cir. 1994) (internal quotation omitted). For example, in *Echevarria*, we affirmed dismissal under Fed. R. Civ. P. 12(b)(6) when the plaintiffs failed to plead facts tending to show the third-party involvement required for a Section 8(b) claim. *Echevarria*, 256 F.3d at 626. There, the plaintiffs alleged that the Chicago Title and Trust Co. had overcharged them for the recording service, and then split this amount with the Cook County Recorder by paying the recorder its fee and pocketing the overage. *Id.* at 625. We held that Section 8(b) did not apply because the title company both collected and

retained fees from the plaintiffs in the same capacity. *Id.* We noted that if we subjected a settlement service provider to RESPA liability for keeping an overcharge without requiring an allegation that the unearned fee was shared with a third party, "we would radically, and wrongly, expand the class of cases to which RESPA applies." *Echevarria,* 256 F.3d at 627. Therefore, insofar as the Weizeoricks argue that liability attaches to AAMG under Section 8(b) simply for accepting an overcharge as part of a real estate settlement transaction, they are incorrect. A well-pleaded complaint based upon a violation of Section 8(b) must allege that the defendant shared an unearned fee with a third party to the real estate transaction. *Echevarria,*256 F.3d at 627. *See also, Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002).[2]

In response, the Weizeoricks argue that even if they cannot succeed by merely challenging AAMG's receipt of an unearned fee, they have nonetheless alleged a fee split consistent with the statute. In support of this position the Weizeoricks direct our attention to a similar Section 8(b) case where a district court denied a motion to dismiss where the plaintiffs alleged a similarly atypical feesplit. *See Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000). In

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[2] We also do not defer, as the Weizeoricks would have us, to the Department of Housing and Urban Development's (HUD) policy statement on this provision. *See Real Estate Settlement Procedures Act Statement of Policy* 2001-1, 66 Fed.Reg. 53052, 53057 (Oct. 18, 2001). We have previously declined to defer to HUD's interpretation of Section 8(b), since the statute is clear on its face and HUD's statement was adopted without any formal rule-making procedures. *Kzralic,* 314 F.3d at 881.

Christakos, the title company, Intercounty Title, was responsible for handling the paperwork associated with refinancing a home loan. *Id.* at 499-500. The bank holding the initial mortgage agreed to file the paperwork to release the mortgage, but Intercounty Title twice charged the plaintiff to have the mortgage released, once by the bank and once by Intercounty. *Id.* at 500. However, only the bank actually prepared and filed the release. The court found that the plaintiffs successfully alleged a split in violation of Section 8(b) because Intercounty shared the fee with a third party, the bank. *See id.* at 503. Specifically the court found that the two recording fee payments "were made from the same pool of funds from the loan proceeds over which [the title company], as settlement agent, had control" and from which it directed payments to be made. *Christakos,* 196 F.R.D. at 503. *Christakos* is not in conflict with *Echevarria,* in that the plaintiff alleged that the defendant in *Christakos* shared an unearned fee with a third party involved in the real estate transaction. Intercounty Title did not merely accept an unearned fee, but instead accepted fees for a single service, and split that fee with a third party, who then performed the service.

Against this backdrop we review the Weizeoricks' complaint. Significantly, the Weizeoricks allege that AAMG violated RESPA because they received a $10.00 fee to record the release of the Weizeoricks' mortgage, even though the release was recorded by the closing company, and the closing company received a separate fee for its services. For purposes of this 12(b)(6) determination, we need to examine the "Payoff Statement" and the "Settlement Statement"

referenced in the Weizeoricks' complaint.[3] This will bring into focus the exact nature of the alleged transaction between the Weizeoricks, the closing company and AAMG. According to the Settlement Statement, the Weizeoricks' return from the sale of their house was subject to several different reductions upon closing. First, the Weizeoricks were charged a "RELEASE FEE" of $25.60 as part of their $8063.00 in settlement charges. This group of charges was accepted by the closing company and was listed on the "Settlement Statement" as "Settlement charges to the seller." In addition, they were charged $92,483.12 as a "Payoff of first mortgage loan." This figure was supplied to the closing company by AAMG through a "Payoff Statement."[4] Included in this figure was a "Recording discharge/release of Lien Fee" of $10.00 as well as "Fax Fees" of $15.00. Thus, the Weizeoricks allege they were charged a total of $35.60, $10.00 paid to AAMG and $25.60 paid to the closing company, for the single service of recording the release of the lien on their title.

If we draw all reasonable inferences from these allegations in the Weizeoricks' favor, *Scott v. O'Grady,* 975 F.2d 366,

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[3] Fed. R. Civ. P. 10(c) provides "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *See also Rosenblum v. Travelbyus.com Ltd.*, 299 F.[3d] 657, 660 (7th Cir. 2002).

[4] The actual figure supplied to the title company by AAMG was $92,447.92, but with a provision that the amount would be adjusted by a per diem interest rate of $17.60. If we add two days of per diem interest added to the total supplied in the payoff statement, or $35.20, we arrive at the settlement statement's figure of $92,483.12.

368 (7th Cir. 1992), the Weizeoricks have successfully alleged a split of fees in violation of RESPA section 8(b). Unlike *Echevarria,* there are three parties to this real estate transaction: the Weizeoricks, AAMG and the closing company. We can reasonably infer from the complaint and attached documents that the closing company made the payment of the $10.00 for the recording of the release to AAMG from the pool of funds involved in the transaction. According to the documents, the closing company also made a payment to the Weizeoricks that represented their return on the sale of their house, less the closing company's recording fee. AAMG, therefore, allegedly received a $10.00 split of the recording fee from the closing company, even though they did not record the release. As AAMG notes, this case does differ slightly from *Christakos*. AAMG, the named defendant here, is the entity that received the unearned payment for allegedly performing no service. In *Christakos,* it was the closing company that had control over the funds and paid out the fee split. However, this is a distinction without a difference because the statute does not place liability on only the entity who pays out the alleged kickback, but instead places liability on both the giver and receiver of an unearned kickback.[5] Therefore, the defendant in a Section 8(b) cause of action need not be the party who had control over the split

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[5] "No person shall give *and no person shall accept* any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service ...." 12 U.S.C. § 2607(b). In addition to civil penalties, *RESPA* also establishes criminal sanctions for violations, including up to one year in prison. These penalties provide that both the giver and the acceptor of the unearned fees are jointly and severally liable. *See* 12 U.S.C. § 2607(d)(1)-(2).

fees, as long as a fee split is alleged. Nor does the statute require that the plaintiff allege that all of the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement. *Christakos,* 196 F.R.D. at 503. The Weizeoricks' allegation could be interpreted in a way that AAMG is itself the third party involved in the fee split, because AAMG accepted an allegedly unearned portion of a recording fee from the title company, who also kept part of the charged fee and actually performed the service of recording the release. If this angle is pursued, the district court will need to sort out any facts that would substantiate such an interpretation.

Pursuant to Section 8(b), the Weizeoricks must also allege the fee was collected "other than for services actually performed." 12 U.S.C. § 2607(b). Because the Weizeoricks allege that the title company, and not AAMG, recorded the release of the lien, the $10.00 fee collected by AAMG may have been unearned and therefore their complaint satisfies the statutory requirement. However, on appeal, the Weizeoricks conceded that AAMG prepared and delivered the lien release to the title company. It is possible that AAMG's $10.00 fee was incurred for the preparation or delivery of the release. It is also possible that AAMG charged for that service elsewhere in the "Payoff Statement," for example as a "Fax Fee." Moreover it is not entirely clear, based on the settlement statement, that the Weizeoricks themselves paid for the entirety of the recording fees. The buyer of the house was also charged $71.00 in recording fees, according to the settlement statement, a charge which may have also included the release fee. Every real estate closing is a unique series of fees, payments and other monetary transactions between at least one lender, a buyer, a seller and a closing company

which raises numerous individualized questions just like these. However, those and any related questions are better answered through discovery, because if we confine our review to the complaint, the Weizeoricks have successfully alleged that a third party to their real estate transaction accepted a portion of a fee that was unearned in violation of 12 U.S.C. § 2607(b).

IV.

In conclusion we find that the district court erred in denying the Weizeoricks' RESPA claim based on the court's conclusion that the Weizeoricks failed to plead that AAMG controlled the settlement process and knew that the title company was recording the release of mortgage. Neither is an element of a claim under 12 U.S.C. § 2607(b). The dismissal of the Weizeoricks' RESPA claim with prejudice is therefore REVERSED and REMANDED for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick,)
and others similarly situated,)
Plaintiffs,)
)
v.)
)
ABN AMRO Mortgage Group, Inc.)
Defendant.)

Michael W. Dobbins
CLERK

Office of the Clerk

Mark A. Rabinowitz
Piper, Marbury, Rudnick & Wolfe
203 North LaSalle Street
Suite 1800
Chicago, IL 60601-1293

Case Number: 1:01-cv-00713

Title: Weizeorick v. ABN Amro Mtge Grp

Assigned Judge: Honorable William J. Hibbler

MINUTE ORDER of 11/16/01 by Hon. William J. Hibbler: For the attached reasons, the court grants defendant's motion to dismiss plaintiffs' RESPA claim and denies defendant's motion to dismiss the remaining claims [8-1]. Status hearing set for 12/5/01 at 9:15 a.m. (Entered Memorandum and Order). Mailed notice.

This docket entry was made by the Clerk on November 20, 2001

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick, and others similarly situated, Plaintiffs,	)
v.	)
ABN AMRO Mortgage Group, Inc. Defendant.	)

Honorable William J. Hibbler

Defendant's Motion to Dismiss (#8-1)

DOCKET ENTRY:

For the attached reasons, the Court **GRANTS** Defendant's motion to dismiss Plaintiffs' RESPA claim and **DENIES** Defendant's motion to dismiss the remaining claims. Enter Memorandum and Order. Status hearing set for 12/5/01 at 9:15 a.m.

[For further detail see order attached to the original minute order.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick, and others similarly situated, Plaintiffs,	)
v.	)
ABN AMRO Mortgage Group, Inc. Defendant.	)

JUDGE WILLIAM J. HIBBLER

MEMORANDUM AND ORDER

The named homeowners and others similarly situated have brought suit against a mortgage company, the holder of Plaintiffs' prior mortgage, asserting claims for (1) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, (2) breach of contract, (3) restitution and (4) violation of the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS 505/1, *et. seq.* Defendant moves to dismiss all counts of Plaintiffs' complaint for failure to state a claim upon which relief can be granted. For the following reasons, Defendant's motion to dismiss is GRANTED insofar as it asks the Court to dismiss Plaintiffs' RESPA claim. In all other respects, however, Defendant's motion is DENIED.

Facts

On July 24, 2000, Gregory and Margaret Weizeorick ("Plaintiffs") closed on the sale of their home. In connection with the closing and the repayment of their mortgage, ABN AMRO Mortgage Group, Inc. ("Defendant"), as the holder of Plaintiffs' mortgage, sent Plaintiffs a Payoff Statement on July 18, 2000, indicating their outstanding loan balance and detailing all other charges required to pay off the loan. The Payoff Statement included a $10 fee for the "Recording Discharge/Release of Lien Fee" in the amount owed by Plaintiffs. Plaintiffs paid off their mortgage loan, including the $10 recording fee. At closing, Plaintiffs were charged and paid $25.60 for the same service by their closing agent, who actually recorded the discharge/release of Plaintiffs' mortgage.

Plaintiffs subsequently filed a complaint against Defendant, alleging it had collected fees for services performed by another entity in violation of RESPA and ICFA, and asserting breach of contract and restitution claims. After Plaintiffs filed a motion for class certification, Defendant sent Plaintiffs a check to reimburse them for the $10 recording fee. At the presentment hearing on April 26, 2001, Plaintiffs withdrew their motion for class certification subject to Defendant's preclusion from filing an offer of judgment. (Minute Order 4/26/01.)

Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, not to decide the merits of the case. *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.

Supp. 1399, 1406 (N.D. Ill. 1996). In considering the sufficiency of a complaint, all factual allegations stated in the document are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *Murphy v. Walker,* 51 F.3d 714, 717 (7th Cir. 1995). This Court must sustain a complaint unless it appears beyond doubt the plaintiff can prove no set of facts consistent with the allegations that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Analysis

Plaintiffs' RESPA Claim

Count I of Plaintiffs' complaint alleges Defendant violated RESPA by unlawfully splitting fees with the title company that recorded the release of Plaintiffs' mortgage. 12 U.S.C. § 2607(b). Congress enacted RESPA to "prohibit all kickback and referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." *Mercado v. Calumet Fed. Sav. & Loan Ass'n,* 763 F.2d 269, 270-71 (7th Cir. 1985) (quoting S.Rep. 93-866, 93d Cong., 2d Sess. (1974)). Consistent with this goal of preventing kickbacks, RESPA states "no person shall give and no person shall accept any portion split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

Here, both parties agree RESPA requires Plaintiffs to allege Defendant split fees with a third party; however, they disagree on what constitutes third party involvement under the

Act. The Seventh Circuit recently addressed this issue in *Echevarria v. Chicago Title & Trust Co.* 256 F.3d 623 (7th Cir. July 5, 2001). In *Echevarria,* homebuyers alleged the title company violated RESPA by unlawfully splitting fees with the County Recorder. Specifically, the plaintiffs alleged the $45 fee they paid to defendant was "illegally split when [the defendant] paid a third party, the County Recorder, a portion of the fees ... and retained the overcharges ... for itself." *Id.* at 626. The Seventh Circuit rejected the plaintiffs' argument, because RESPA required the plaintiffs to allege the defendant "shared an unearned fee with a third party" and the County Recorder did not constitute a third party for purposes of RESPA § 2607(b) since it did not accept a portion of defendant's unearned fees. *Id.* In doing so, it affirmed that unearned fees are not actionable under RESPA unless they are shared by at least two parties. *Id.*

The Court is unable to distinguish Plaintiffs' case from *Echevarria.* Like the plaintiffs in *Echevarria,* Plaintiffs here focus on the total $35.60 they paid to have their release recorded, and allege it was illegally split between the third party title company, which recorded the release and received $25.60, and Defendant, which received $10 of the $35.60. Similarly, Plaintiffs have failed to plead facts showing that Defendant illegally shared fees with the third party title company. Like the County Recorder in *Echevarria,* the title company received no more than its standard release recording fee and it did not give or arrange for Defendant to receive an unearned portion of these fees. *Id.* at 626. Because the title company had no involvement in the unearned $10 fee accepted by Defendant, it is not considered as a third party for purposes of RESPA § 8(b). *Id.* Therefore, Plaintiffs complaint fails to allege the type of third party involvement

necessary to state a claim under RESPA § 8(b). Because Plaintiffs failed to "accuse a third party of accepting unearned fees," they have not stated a claim under RESPA and Defendant's motion to dismiss is granted. *Id.* at 627; *see also Mercado,* 763 F.2d at 270-71.

Plaintiffs' Consumer Fraud Claim

The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") prohibits the "employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression, or omission of any material fact ... in the conduct of any trade or commerce." 815 ILCS § 505/2.

To state a cause of action under ICFA, a plaintiff must allege (1) defendant engaged in a deceptive act or practice; (2) defendant intended for the plaintiff to rely on the act or practice; (3) the act or practice occurred in the course of trade or commerce; and (4) the act or practice proximately caused the plaintiff's injury. *Christakos v. Intercounty Title Co.,* 196 F.R.D. 496, 503 (N.D. Ill. Aug. 25, 2000). ICFA claims are subject to the heightened pleading requirements of Federal Rules of Civil Procedure 9(b) which mandate for alleging fraud with particularity. *See Ackerman v. Northwestern Mut. Life Ins. Co.,* 172 F.3d 467, 469 (7th Cir.1999) (clarifying *Vicom, Inc. v. Harbridge Merch. Serv. Inc.,* 20 F.3d 771, 777 n.4 (7th Cir. 1994)). Federal Rule of Civil Procedure 9(b) mandates a plaintiff who alleges fraud or mistake to state with particularity the circumstances constituting fraud or mistake. Specifically, Rule 9(b) requires the plaintiff to specifically allege the who, what, where, and when of the alleged fraud. *Ackerman,* 172 F.3d at 469-70. The reason for

the heightened pleading requirement in such cases is to force the plaintiff to do more than the usual investigation before filing a complaint "to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Id.*

> Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual), because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it, and because charges of fraud ... frequently ask courts in effect to rewrite the parties' contract or otherwise disrupt established relationships.

Id. at 469 (citations omitted).

The Court finds Plaintiffs sufficiently state with particularity a cause of action under ICFA. First, Plaintiffs adequately pled a deceptive act or practice by Defendant. Specifically, Plaintiffs allege Defendant represented it was collecting a $10 recording fee in its Payoff Statement, and that this was false because Defendant never recorded the release. Second, Plaintiffs allege Defendant made this representation with the itent that Plaintiffs and other rely on it. They argue Defendant's intent can easily be inferred from the fact it automatically included the $10 recording fee in the amount Plaintiffs owed on their mortgage. Third, Plaintiffs allege the representations were made in the course of Defendant's mortgage lending business. Fourth, Plaintiffs allege Defendant's representation proximately caused their damages.

However, Defendant maintains Plaintiffs fail to state a claim under ICFA because the complaint did not allege facts demonstrating Defendant knowingly made false statements. Defendant argues when it issued the payoff statement on July 18, 2000, it did not know the title company would record the release and charge Plaintiffs a fee for doing so at the July 24, 2000 closing.

Plaintiffs deny Defendant's assertion and maintain Defendant knew or should have known that it would not ultimately record the release of Plaintiff's mortgage. Plaintiffs also point to Defendant's failure to return Plaintiffs' fee after it discovered the title company had recorded the release as further evidence of Defendant's misrepresentation and its intent for Plaintiffs to rely on its misrepresentation. Finally, Plaintiffs maintain Defendant deliberately charged Plaintiffs for a service it did not intend to perform or knew was unnecessary because the title company traditionally recorded such releases.

Whether Plaintiffs can establish Defendant knew or should have known it would not record the release of Plaintiffs' mortgage when it charged Plaintiffs the $10 fee is a question of fact to be addressed at a later stage of this proceeding. Plaintiffs' complaint contains sufficient averments about Defendant's knowledge and intent, and Plaintiff has pleaded successfully the ICFA violations at the heart of the complaint.

Further, Defendant argues Plaintiffs' ICFA claim fails because it is at most an ordinary breach of contract action. Courts have repeatedly resisted attempts by plaintiffs to plead ordinary breach of contract claims as causes of action under the ICFA. *Golembiewski v. Hallberg Ins. Agency,* 635

N.E.2d 452, 460 (1st Dist. 1994). "Every individual breach of contract between two parties...does not amount to a cause of action cognizable under the (ICFA)... If the (ICFA) did apply, then common law breach of contract actions 'would be supplemented in every case with an additional and redundant remedy'" *Id.* at 121 (quoting *Exchange Nat'l Bank v. Farm Bureau Life Ins. Co,* 438 N.E.2d 1247, 1250 (Ill. 1982)). However, even if the face of Plaintiffs' complaint alleges a standard breach of contract claim, the Court may find it sufficient to state a cause of action under ICFA if Defendant's alleged misconduct implicates consumer protection concerns. Scarsdale Builders, Inc. V. Ryland Group, Inc., 911 F.Supp. 337 (N.D. Ill 1996). "[W]here a plaintiff attempts to allege a violation of the Act in a case which appears on its face to involve only a breach of contract, the relevant inquiry is whether the alleged conduct implicates consumer protection concerns." *Id.* at 340 (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.,* 546 N.E.2d 33, 41 (Ill.App.Ct. 1989)). Here, Plaintiffs suggest consumer protection concerns are at issue, as Plaintiffs allege "by including the $10 charge in its payoff statements, Defendant is collecting funds that it knows borrowers have no choice but to pay because the title company will not allow the closing to proceed unless the borrower remits the entire payoff amount to the mortgage company." (Pls. Resp. Mot. Dismiss at 6.) Therefore, while not every unfulfilled contract promise constitutes a violation of ICFA, Plaintiffs' complaint alleges conduct within the Act's coverage.

Plaintiffs' Breach of Contract and Restitution Claims

Count II of Plaintiffs' complaint alleges Defendant breached its contract with Plaintiffs by failing to record the

release of their mortgage. In Count III, Plaintiffs allege the related claim that they are entitled to restitution of the $10 fee. To state a cause of action for breach of contract, a plaintiff must allege (1) the existence of a valid and enforceable contract; (2) the performance of the contract by the plaintiff; (3) breach of the contract by the defendant; and (4) a resulting injury to plaintiff. *Hickox v. Bell,* 552 N.E.2d 1133, 1143 (Ill.App.Ct. 1990).

Here, Plaintiffs have adequately pleaded the elements of a breach of contract claim. First, Plaintiffs' complaint includes a copy of the Payoff Statement issued by Defendant and alleges it contained a promise to record the discharge/release of Plaintiffs' mortgage in exchange for Plaintiffs' payment of $10. Second, Plaintiffs' complaint includes a Settlement Statement demonstrating that Plaintiffs paid off their mortgage, including the $10 recording fee. Third, Plaintiffs allege and Defendant concedes that Defendant did not record the release of Plaintiffs' mortgage. Fourth, Plaintiffs allege damages caused by Defendant's breach.

Defendant maintains Plaintiffs' breach of contract claim fails because "Defendant's Payoff Statement does not contain a promise to record the release, but merely states that, if plaintiffs request, [Defendant] would charge $10 to do so." (Mot. Dismiss at ¶6.) However, even if Defendant's interpretation of its duties could be reasonably inferred from the Payoff Statement, at this stage the Court must draw all reasonable inferences in Plaintiffs' favor and accept all well-pleaded factual allegations in the complaint as true. Here, the terms of the Payoff Statement are consistent with Plaintiffs' allegations that Defendant had a duty to record the

discharge/release of their mortgage, and failure to do so constituted a breach of the agreement. Therefore, because Plaintiffs have sufficiently pleaded the elements of a breach of contract claim, Defendant's motion to dismiss Count II is denied.

Further, the Court finds Defendant's argument for mootness similarly unpersuasive. After Plaintiffs filed this complaint and moved for class certification, Defendant mailed the named Plaintiffs a check for their $10 fee and thus, according to Defendant, their breach of contract and restitution claims are moot. The Court addressed this issue at the presentment hearing on this motion when it stated "Plaintiff's motion for class certification is withdrawn in open court without prejudice with leave to refile[,] subject to Defendant being precluded to filing an offer of judgment." (Minute Order April 26, 2001.) Thus, Defendant is prohibited from the "tactic" of using a Federal Rule of Civil Procedure 68 offer of judgment to buy off the named plaintiff prior to the time the Court addresses class certification. *Greisz v. Household Bank,* 176 F.3d 1012, 1015 (7th Cir. 1999). The certification of a class operates as a material change in the nature of the litigation which extinguishes a pending Rule 68 offer of judgment against a single plaintiff. As the Seventh Circuit observed, "an offer to one is not an offer of the entire relief sought by the suit." *Id.* Here, Defendant attempts unsuccessfully to reinterpret the Court's above order and to distinguish its effectiveness between individual and class claims. However, Defendant is not permitted to try to warp the valuable purpose of Rule 68 offers of judgment: to serve as a means of facilitating and encouraging settlements, rather than as a tactical device to gain an advantage by racing to the courthouse. *See Asch v. Teller, Levit & Silvertrust,* 200

F.R.D. 399, 400+ (N.D. Ill. 2000). The Court will hold Defendant to both the letter and spirit of its order and the law. *See generally Greisz,* 176 F.3d at 1014-15; *Holstein v. City of Chicago,* 29 F.3d 1145, 1147 (7th Cir. 1994); *Kremnitzer v. Cabrera & Rephen,* 202 F.R.D. 239, 242 (N.D. Ill. 2001); *Janikowski v. Lynch Ford, Inc.,* No. 98 C 8111, 1999 WL 608714 (N.D.III. Aug. 5, 1999), *aff'd on other grounds,* 210 F.3d 765 (7th Cir. 2000); *Gibson v. Aman Collection Serv., Inc.,* No. IP 00-17908-C T/G, 2001 WL 849525, at *1 (S.D.Ind. May 23, 2001).

CONCLUSION

For the above reasons, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part

IT IS SO ORDERED.

DATED: November 16, 2001

/s/_____
WILLIAM J. HIBBLER,
DISTRICT JUDGE